

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE EXPLORATION MERCANTILE COMPANY
(a Corporation),

Plaintiff in Error,

vs.

PACIFIC HARDWARE AND STEEL COMPANY
(a Corporation), **GIANT POWDER COMPANY**
CONSOLIDATED (a Corporation), and **J. A.**
FOLGER AND COMPANY (a Corporation)
Petitioning Creditors,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court
for the District of Nevada.

FILED
SEP 29 1909

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE EXPLORATION MERCANTILE COMPANY
(a Corporation),

Plaintiff in Error,

vs.

PACIFIC HARDWARE AND STEEL COMPANY
(a Corporation), GIANT POWDER COMPANY,
CONSOLIDATED (a Corporation), and J. A.
FOLGER AND COMPANY (a Corporation),
Petitioning Creditors,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court,
for the District of Nevada.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Petition in Bankruptcy, Creditors'..	1
Answer and Demand for Inquiry by a Jury....	15
Assignment of Errors	57
Certain Proceedings had July 9, 1909.....	28
Certificate of Clerk U. S. District Court to Transcript of Record	66
Citation—Original	69
Creditors' Amended Petition in Bankruptcy...	1
Decree or Judgment on Verdict, Motion to Stay Entry of	28
Judgment on Verdict, Motion to Stay Entry of Decree or	28
Motion to Stay Entry of Decree or Judgment on Verdict	28
Opinion of District Court.....	30
Order Allowing Writ of Error, etc.....	64
Order Declaring and Adjudging the Explora- tion Mercantile Company Bankrupt.....	54
Order Referring Matter to Referee in Bank- ruptcy, etc.	55
Petition for Writ of Error, etc.....	56
Petition for Writ of Error, Undertaking on....	61

Index.	Page
Petition in Bankruptcy, Creditors' Amended..	1
Plea to the Jurisdiction.....	20
Praeipie for Transcript of Record.....	65
<i>Replication</i> Transcript of Record, Certificate of Clerk U. S.	71
District Court to.....	66
Transcript of Record, Praeipie for.....	65
Undertaking on Petition for Writ of Error....	61
Verdict	26
Verdict, Motion to Stay Entry of Decree or Judgment on	28
Writ of Error, etc., Order Allowing.....	64
Writ of Error—Original.....	67
Writ of Error, etc., Petition for.....	56
Writ of Error, Undertaking on Petition for....	61

[Creditors' Amended Petition in Bankruptcy.]

*In the District Court of the United States, in and for
the District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
COMPANY (a Corporation),

An Alleged Bankrupt.

To the Honorable E. S. FARRINGTON, Judge of
the District Court of the United States, for the
District of Nevada:

Leave of this Honorable Court having been first
had and obtained therefor, the amended petition of

THE GIANT POWDER COMPANY, CONSOLI-
DATED, a corporation, organized and existing under
and by virtue of the laws of the State of California,
and having its principal place of business in the City
and County of San Francisco, State of California;
and

PACIFIC HARDWARE AND STEEL COM-
PANY, a corporation, organized and existing under
and by virtue of the laws of the State of New Jersey,
and having its principal place of business in the City
and County of San Francisco, State of California;
and

J. A. FOLGER & COMPANY, a corporation,
organized and existing under and by virtue of the
laws of the State of California, and having its prin-
cipal place of business in the City and County of

2 *The Exploration Mercantile Company vs.*

San Francisco, State of California; respectfully shows:

That at all the times hereinafter mentioned the respondent above named, Exploration Mercantile Company, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, County of Esmeralda, State of Nevada.

That said respondent, Exploration Mercantile Company, has for the greater portion of six months next preceding the time of filing the original petition of these petitioners herein, and ever since said time, had its principal place of business at Goldfield, County of Esmeralda, State of Nevada, and that at all of said times it has been and now is engaged principally in trading and mercantile pursuits.

That said Exploration Mercantile Company, a corporation, at the time of filing the said original petition, owed debts to the amount of One Thousand Dollars, and ever since said time has continued to owe, and now owes, debts to the amount of One Thousand Dollars.

That at the time of filing the said original petition your petitioners were, ever since have been, and now are, creditors of said Exploration Mercantile Company, a corporation, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of Five Hundred Dollars.

That the nature and amount of your petitioners' claims are as follows:

An open account for goods, wares and merchandise, sold and delivered by said The Giant Powder Company Consolidated, a corporation, to said Exploration Mercantile Company, a corporation, within two years last preceding the time of filing the said original petition, in the sum of Three Hundred and Sixty and $45/100$ Dollars; and a promissory note in the sum of Fifteen Thousand Eight Hundred and Eighty-eight and $72/100$ Dollars, given by said Exploration Mercantile Company, a corporation, to said The Giant Powder Company Consolidated, a corporation, dated March 12, 1908, payable one day after date, with interest at eight per centum per annum, which said note was given in consideration of goods, wares and merchandise sold and delivered prior to said 12th day of March, 1908.

An open account for goods, wares and merchandise sold and delivered by said Pacific Hardware and Steel Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last preceding the time of filing the said original petition, in the sum of Three Hundred Seventy-six and $43/100$ Dollars; and a promissory note in the sum of Fifteen Thousand Thirty-five and $56/100$ Dollars, given by said Exploration Mercantile Company, a corporation, to said Pacific Hardware and Steel Company, a corporation, dated March 2, 1908, payable one day after date, with interest at eight per centum per annum, which said note was given in consideration of goods, wares and merchandise sold and delivered prior to said 2d of March, 1908.

4 *The Exploration Mercantile Company vs.*

An open account for goods, wares and merchandise, sold and delivered by said J. A. Folger and Company, a corporation, to said Exploration Mercantile Company, a corporation, within two years last preceding the time of filing the said original petition in the sum of Three Hundred and Sixty and $63/100$ Dollars, and a promissory note in the sum of Two Thousand Thirty-three and $16/100$ Dollars, given by said Exploration Mercantile Company, a corporation, to said J. A. Folger and Company, a corporation, dated March 16, 1908, payable one day after date, with interest at eight per centum per annum, which said note was given in consideration of goods, wares and merchandise, sold and delivered prior to said 16th day of March, 1908.

And your petitioners further represent, that at the date of filing the said original petition herein, to wit, September 12, 1908, for more than four months continuously next prior thereto and ever since said time, the said Exploration Mercantile Company, a corporation, has been and now is, insolvent; that at the date of filing the said original petition herein, to wit, September 12, 1908, for more than four months continuously next prior thereto and ever since said time, the aggregate of said Exploration Mercantile Company's property, at a fair valuation, amounted to less than the sum of Sixty Thousand Dollars, and that at all the said times its debts were in excess of Seventy-four Thousand Dollars; and that within four months next preceding the date of the filing of said petitioning creditors' original petition the said Exploration Mercantile Company, a corpora-

tion, committed an act of bankruptcy, in that it did heretofore, to wit, on or about the 6th day of August, A. D. 1908, being insolvent, apply for a receiver for its property, that is to say:

That on or about the 14th day of February, A. D. 1906, the said Exploration Mercantile Company, a corporation, was organized by W. C. Stone, C. E. Wylie and Frank G. Hobbs; that the amount of the capital stock of the said corporation was then and there, and ever since has been, \$50,000.00, divided into 50,000 shares of the par value of \$1.00 each; that the original subscribers to said capital stock and the amounts subscribed by each are as follows, to wit: W. C. Stone, 48,000 shares, C. E. Wylie, 1,000 shares, and Frank G. Hobbs, 1,000 shares; that said W. C. Stone, C. E. Wylie and Frank G. Hobbs ever since the organization of said corporation have been and still are the owners of the said shares of the capital stock of said corporation and of all the capital stock thereof; that although the Articles of Incorporation of said Exploration Mercantile Company, a corporation, provide that the number of directors of said corporation shall be five, there have never been more than three directors thereof and that at all the said times since the organization of said corporation, said W. C. Stone, C. E. Wylie and Frank G. Hobbs, have been and now are the directors thereof; and that at all times herein mentioned said W. C. Stone has been and now is the President, said C. E. Wylie has been and now is the Vice-president, and said Frank G. Hobbs has been and now is the Secretary and Treasurer of said corporation.

That on and prior to the 6th day of August, A. D. 1908, certain of the creditors of said Exploration Mercantile Company, a corporation, which was then and there insolvent as aforesaid, were demanding payment of their just claims against said corporation, but there was then and there no actual or threatened attachment or litigation involving, or against, said corporation otherwise than to enforce said claims; that said W. C. Stone, C. E. Wylie and Frank G. Hobbs, said directors and officers of said corporation, then and there conspired and agreed together and they have ever since conspired and agreed together to take such measures and do such acts as would hinder, delay and defraud the creditors of said corporation; would compel said creditors to accept less than the full payment of their just claims, and thereby wrongfully obtain for said directors and officers a large part of the property of the said Exploration Mercantile Company, a corporation, which was then and there insolvent as aforesaid; and would evade the provisions of the laws of the United States in reference to bankruptcy, and prevent said creditors from obtaining a knowledge of the true condition of said corporation's affairs and from having, or participating in, the choice of a person or persons to act as trustee of said corporation or its property.

That in pursuance of said conspiracy and agreement said directors and officers, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, A. D. 1908, caused to be filed in the District Court of the First Judicial District

of the State of Nevada in and for the County of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation, which said application was and is in the words and figures following, to wit:

“In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges:

I. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of Fifty Thousand Dollars (\$50,000), divided into fifty thousand (50,000) shares of the par value of One (\$1.00) Dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-president, and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence, Goldfield, Nevada; Frank G. Hobbs, residence, Goldfield, Nevada, and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corpora-

tion has liabilities in the sum of about Sixty-five Thousand Dollars (\$65,000), and has assets, exceeding the sum of Ninety-five Thousand Dollars (\$95,000); that among the creditors of said corporation defendant, and about the amounts owed them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand (\$10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars (\$2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars (\$2,300); and John S. Cook & Company of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars (\$16,000).

II. That, owing to the depressed condition in business, and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby;

That plaintiff is the holder of more than one-tenth ($1/10$) of the capital stock of the said corporation defendant, in his own name and person, fully paid

up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for;

Wherefore, plaintiff prays for the order of this Court, appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation and each of them be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver; and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal]

I. S. THOMPSON,
Notary Public.”

That on said day a summons was issued out of said Court and said C. E. Wylie in pursuance of said conspiracy and agreement then and there acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, endorsed thereon an admission of service thereof in the words and figures following, to wit:

“August 6th, 1908. I, the undersigned do hereby admit that a copy of the complaint and a copy of the summons in the above action were delivered to me this day and I as manager and director of the said Exploration Mercantile Company do hereby admit and accept service of this summons for said corporation.

C. E. WYLIE.”

And on said day said directors and officers acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, caused said summons so endorsed to be returned to said Court and filed with the Clerk thereof. That in further pursuance of said conspiracy and agreement and on said 6th day of August, A. D. 1908, said directors and officers, acting for and on behalf and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, caused to be filed with the said Court and the Clerk thereof an appearance and application for the appointment of a receiver of the property of said Exploration

Mercantile Company, a corporation, which said appearance and application was and is in the words and figures following, to wit:

“In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY (a Corporation),

Defendant.

“Now comes C. E. Wylie, Manager and one of the Directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled Court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation.

C. E. WYLIE,

Manager and Director of the Exploration Mercantile Company.”

That there has never been any process issued or appearance made in said cause in said State Court except as above set forth.

That thereupon, on said 6th day of August, A. D. 1908, said directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, moved the said State Court upon the said pleadings as above set forth, for an order, and said State

Court, on said day made its order, appointing said C. E. Wylie receiver of the property of said Exploration Mercantile Company, a corporation, with full power to take charge of the assets, control and business of said company; that said C. E. Wylie thereupon filed his bond as such receiver, took the oath of office, and on the 7th day of August, 1908, took possession of the business, property, and effects of said corporation as such receiver, and thence hitherto has continued to act and is now acting as such receiver and at all said times has been and now is in possession of said property as such receiver.

That on or about the 8th day of September, A. D. 1908, and at other times, in further pursuance of said conspiracy and agreement the said W. C. Stone, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, sought to bring about a settlement of the claims of said creditors of said Exploration Mercantile Company, a corporation, whereby said creditors would obtain not to exceed sixty per centum of their said claims; and said W. C. Stone then and there said to these petitioners that by making such settlement said creditors would obtain a greater sum of money for their said claims than they would if they litigated their claims or if the affairs of said corporation were administered in bankruptcy by the United States Court, and that by making such settlement said directors and officers would make something for themselves.

That said directors and officers in pursuance of said conspiracy and agreement have, ever since the

said 6th day of August, A. D. 1908, refused and still refuse these petitioners access to the books of account, the stock-book, the book of by-laws, minute-book, and all other books of said Exploration Mercantile Company, a corporation, and at all said times refused and now refuse to permit the agent and representative of these petitioners to take or assist in taking, an inventory of the property of said corporation, although such access and opportunity was requested.

That ever since said 6th day of August, A. D. 1908, said Exploration Mercantile Company, a corporation, and each and all of said directors and officers have acquiesced in, upheld, ratified and confirmed the said proceedings and application for, and appointment of, said receiver as aforesaid; and said Frank G. Hobbs has ratified and confirmed the same and has since been continuously in the employ of said receiver.

That all of said directors and officers have, with reference to all the above-mentioned matters and things, been advised and represented by one and the same firm of attorneys, namely, Thompson, Morehouse and Thompson.

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon Exploration Mercantile Company, a corporation, as provided in the acts of Congress relating to bank-

ruptcy, and that it may be adjudged bankrupt within the purview of said acts.

THE GIANT POWDER COMPANY, CONSOLIDATED

By C. C. QUINN,

Secretary of said Corporation.

PACIFIC HARDWARE AND STEEL COMPANY

By W. H. SCOTT,

Assistant Secretary of said Corporation.

J. A. FOLGER & CO.

By R. R. VAIL,

Secretary of said Corporation.

E. E. ROBERTS,

J. L. KENNEDY,

ROBERT RICHARDS,

Attorneys for Petitioners.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. C. Quinn, W. H. Scott and R. R. Vail, do hereby make solemn oath that said C. C. Quinn is Secretary of the Giant Powder Company Consolidated, a corporation, one of the petitioners herein; that said W. H. Scott is Assistant Secretary of the Pacific Hardware and Steel Company, a corporation, one of the petitioners herein; that said R. R. Vail is Secretary of J. A. Folger and Company, a corporation, one of the petitioners herein; and that the

statements contained in the foregoing petition subscribed by them are true.

C. C. QUINN,
W. H. SCOTT,
R. R. VAIL.

Before me, J. D. Brown, a Notary Public in and for the City and County of San Francisco, State of California, this 22nd day of October, A. D. 1908.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, an Alleged Bankrupt. In Bankruptcy. Creditors' Amended Petition. Filed October 24th, 1908 at 11 o'clock and 30 minutes A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for Petitioners, Carson, Nevada.

[Answer and Demand for Inquiry by a Jury.]

*In the District Court of the United States, in and for
the District of Nevada.*

In the Matter of the EXPLORATION MERCANTILE COMPANY (a Corporation),
An Alleged Bankrupt.

Now comes the Exploration Mercantile Company, the corporation against whom a petition for an adjudication in bankruptcy has been filed herein, and

does hereby controvert the Amended Petition, and files the following Answer:

I. That said Exploration Mercantile Company did not commit an act of bankruptcy as alleged in the amended petition, but on the contrary charges the fact to be that all proceedings taken in said District Court of the State of Nevada was taken against it and was not the act of said Exploration Mercantile Company.

II. That at the time of the filing in said State District Court of the proceeding set out in said amended petition, said Exploration Mercantile Company was not insolvent, but, on the contrary avers, that its property at a fair valuation, was more than sufficient to pay its debts.

III. That said Exploration Mercantile Company never at any time applied for a receiver, and denies that there was no threatened litigation or threatened attachments against it, but on the contrary avers, that a suit was brought and an attachment issued against it on the said 6th day of August, 1908, and released only by virtue of the said proceedings in said State District Court.

IV. That it is not true that W. C. Stone, C. E. Wylie and Frank G. Hobbs conspired or agreed to such measures or acts to hinder, delay and defraud the creditors of said Exploration Mercantile Company, or to compel said or such creditors to accept less than the full payment of their just claims or to wrongfully or otherwise obtain for said directors or officers a large part of the property of said Ex-

ploration Mercantile Company, a corporation, or that they or either of them intended to or would evade the laws of the United States, in reference to bankruptcy, or prevent said creditors from obtaining knowledge of the true condition of the affairs of said corporation or participating therein, or to prevent said creditors of a choice of a person or persons as trustee or trustees of said corporation, or its property; or that in pursuance of any conspiracy or agreement, said directors or officers acting for or in behalf of or as the act or deed of said corporation or that said corporation was then or there insolvent, on the 6th day of August, 1908, or at any other time caused to be filed in said State District Court, the application set forth in said amended petition or that any of the acts set out in said amended petition was the act or deed of said corporation, while insolvent or with a view of insolvency or was through any conspiracy or agreement to injure, delay or defraud any creditor or creditors of said corporation.

V. That said W. C. Stone did on or about the 8th day of September, 1908, make by way of compromise, and not otherwise, a proposition to said petitioners to adjust their claims upon a basis approximately at sixty per centum but such proposition of compromise was not made in pursuance of or in furtherance of any conspiracy, but solely for the reason that by the wrongful and unjust acts of these petitioners in filing the original petition herein, and causing an injunction to issue out of this Court, they closed up the business of said corporation, then

a going concern, to its great damage and to the damage and injury of the creditors thereof, and stopped and prevented the said corporation from carrying on and conducting its business, and drove its customers to other people and destroyed its good will, which was then and there of great value, and by reason thereof the said W. C. Stone made the said proposition of compromise and not otherwise.

VI. It is true that said officers, but not in conspiracy or agreement, have refused to let one J. L. Kennedy have access to its books, upon personal demand made by him, and for the reason that the said corporation was in the hands of a receiver in the said proceedings, in said State Court, and therefore its books and papers were in the custody of the law and not in the custody and control of the officers and directors of said corporation and it avers: That said creditors or either of them could at any time apply to said State Court and obtain any inspection of the books of said corporation they or any of them desired.

VII. It is not true that said Exploration Mercantile Company or any of its officers have acquiesced in said proceedings, in said State Court, further than they were bound so to do by reason of the nature and character of said proceedings, and as they were bound to do, under the State law applying to said proceeding.

VIII. That the proceeding in said State Court was commenced prior to the filing of the petition herein and that said State Court had jurisdiction in the premises both of the subject matter and person

of said Exploration Mercantile Company, and its receiver was duly and regularly appointed and duly and regularly qualified and was in the sole and exclusive possession of all the property of this corporation when the petition was filed herein, and that said Court was and is a separate court, over which this Hon. Court has no supervisory control or jurisdiction and that the proceedings in said State Court was not an act of bankruptcy, and therefore, this Hon. Court has no jurisdiction in the premises and therefore it avers it should not be declared bankrupt, for any cause in said amended petition alleged, and this it prays and demands and that the matter may be inquired into by a jury.

EXPLORATION MERCANTILE COMPANY,
By FRANK G. HOBBS,
Secretary.

State of Nevada,
County of Esmeralda,—ss.

Frank G. Hobbs, being duly sworn, says: That he is the Secretary of the Exploration Mercantile Company, alleged bankrupt herein, and does hereby make solemn oath that the statements of fact contained in the foregoing answer are true, according to the best of his knowledge, information and belief.

FRANK G. HOBBS.

Subscribed and sworn to before me this 28th day of October, A. D. 1908.

[Seal]

H. M. FARNAM,

Notary Public in and for the County of Esmeralda,
State of Nevada.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Alleged Bankrupt, Exploration Mer-
cantile Company.

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of the Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. Answer and Demand for Jury. Filed Octr. 30, 1908 at 9 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Alleged Bankrupt. Goldfield, Nevada.

[Plea to the Jurisdiction.]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 103.

In the Matter of the EXPLORATION MERCAN-
TILE COMPANY (a Corporation);
An Alleged Bankrupt.

Walter C. Stone, plaintiff in the action pending in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, entitled "Walter C. Stone, Plaintiff, vs. Exploration Mercantile Company (a corporation), Defendant," specially appearing under protest

herein, and for the purposes of this plea and for no other, says that it is not true that said alleged bankrupt on the 6th day of August, 1908, being insolvent, applied for a receiver for its property, or that said Mercantile Exploration Company is insolvent, or that it filed any petition of any kind for a receiver, or that such proceeding in said State Court was or is an act of bankruptcy, but that said proceeding in said State Court was filed by Walter C. Stone, as a stockholder in said corporation, the said Exploration Mercantile Company, under and by virtue of the provisions of an Act of the Legislature of the State of Nevada, entitled "An Act providing a general corporation law," approved March 16th, 1903, and which said proceeding in said State Court was duly commenced by the filing by said Walter C. Stone of a complaint in said State Court, in the words and figures following, to wit:

"In the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda.

W. C. STONE,

Plaintiff,

vs.

EXPLORATION MERCANTILE COMPANY,

Defendant.

The plaintiff complaining of the defendant alleges:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State

of Nevada, with its principal place of business at Goldfield, in the County of Esmeralda, State of Nevada; that the defendant, as such corporation, has a capital stock of fifty thousand dollars (\$50,000), divided into fifty thousand (50,000) shares of the par value of one (\$1.00) Dollar per share; that the officers of said corporation are the plaintiff, President; C. E. Wylie, Vice-president; and Frank G. Hobbs, Secretary and Treasurer; the directors of said company are: W. C. Stone, residence, Goldfield, Nevada; Frank G. Hobbs, residence, Goldfield, Nevada, and C. E. Wylie, residence, Goldfield, Nevada; that the capital stock of said corporation has been fully paid up and that there is no stock in the treasury of said corporation. That said corporation has liabilities in the sum of about Sixty-five Thousand Dollars (\$65,000), and has assets, exceeding the sum of Ninety-five Thousand (\$95,000) Dollars; that among the creditors of said corporation defendant, and about the amounts owed them, are: Pacific Hardware & Steel Co., San Francisco, California, in the sum of Fifteen Thousand Dollars; Giant Powder Company, Con., San Francisco, California, in the sum of Fifteen Thousand Dollars; J. R. Garrett, Marysville, California, in the sum of Ten Thousand (\$10,000) Dollars; J. A. Folger & Company, San Francisco, California, in the sum of Two Thousand Eight Hundred Dollars (\$2,800); Standard Oil Company, Sacramento, California, in the sum of Two Thousand Three Hundred Dollars (\$2,300); and John S. Cook & Company, of Goldfield, Nevada, in the sum of Sixteen Thousand Dollars (\$16,000).

II.

That, owing to the depressed condition in business, and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby;

That plaintiff is the holder of more than one-tenth (1/10) of the capital stock of the said corporation defendant, in his own name and person, fully paid up, and plaintiff avers that by reason of the facts aforesaid, the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for;

Wherefore, plaintiff prays for the order of this Court, appointing a receiver herein, to take charge of the affairs of said corporation, and conduct and manage the same, with a view to its dissolution, under the orders and directions of this Court, and that upon the filing of this complaint, the Court appoint a receiver and fix the amount of bonds to be given by him upon his taking the oath of said appointment; that the Exploration Mercantile Company and the directors of said corporation and each of them

be enjoined and restrained from exercising any of its powers or doing any business except through, by and under said receiver; and for such other and further relief as to the Court may seem meet and proper in the premises.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Plaintiff.

State of Nevada,
County of Esmeralda,—ss.

W. C. Stone, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters, he believes it to be true.

WALTER C. STONE.

Subscribed and sworn to before me this 6th day of August, 1908.

[Seal]

I. S. THOMPSON,
Notary Public.”

—and thereupon, said complaint served on said corporation, and the said corporation duly appeared therein, and such proceedings were had in said State Court, that C. E. Wylie was appointed receiver of said corporation, and duly qualified and he ever since has been, and now is the duly qualified and acting receiver of said corporation, the said Exploration Mercantile Company, and the said receiver at once took possession of the assets of said corporation, and ever since has had and now has the possession there-

of; that said District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, is a court of general jurisdiction, and by the filing of said complaint, and the appearance of said corporation, acquired jurisdiction of the subject matter of said action, and of the person of said corporation and complete jurisdiction, control and possession of the assets of said corporation, and had acquired such jurisdiction and possession of the assets of said corporation long prior to the filing of the petition herein by the creditors of said corporation, in this Honorable Court, and said Walter C. Stone avers, that said proceeding in said State Court was not an act of bankruptcy, and that said corporation has assets which at a fair valuation, far exceed its debts and is not insolvent, and therefore Walter C. Stone insists upon the exemption of said corporation from these proceedings in bankruptcy in this Hon. Court, and says that not this court but the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, has jurisdiction in the premises.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for said Walter C. Stone.

State of Nevada,
County of Esmeralda,—ss.

Walter C. Stone, being duly sworn, says: That he is the Walter C. Stone plaintiff in the action pending in said State Court, as set forth in this Plea,

Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer: No.

INTERROGATORY No. 2.

Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.

Answer: No.

INTERROGATORY No. 3.

Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a Receiver for its property.

Answer: Yes.

Dated this 8th day of July, 1909.

Attest: S. J. HODGKINSON,

Foreman.

[Endorsed]: No. 103. U. S. Dist. Court, Dist. of Nevada. In re Exploration Mercantile Company. In Bankruptcy. Verdict. Filed July 8, 1909 at 4:15 o'clock P. M. T. J. Edwards, Clerk.

[Certain Proceedings Had July 9, 1909.]

*In the District Court of the United States, in and for
the District of Nevada.*

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation),
An Alleged Bankrupt.

July 9th, 1909.

Mr. CARNEY.—If your Honor please, we will ask at this time for an order that the defendant, an alleged bankrupt, be adjudicated a bankrupt.

Mr. MOREHOUSE.—We wish to make this motion, if your Honor please:

[Motion to Stay Entry of Decree or Judgment on Verdict.]

Comes now the Exploration Mercantile Company, an alleged Bankrupt, and moves the Court to desist and stay an entry of a decree or judgment upon the verdict of the jury herein upon the grounds:

1st. That the petition of the petitioners herein does not state a cause of action herein, in this, to wit, that no act or acts of bankruptcy are alleged or set forth in said petition;

2d. That the finding of the jury that the corporation, defendant herein, applied, while insolvent, for a receiver, is not a finding of fact, but a conclusion of law;

3d. That it appears upon the face of said petition that W. C. Stone, a stockholder, and not the corporation, applied for the appointment of a receiver; and that the finding of the jury that the corporation

applied for a receiver is contrary to the averments of said petition, and outside of any issue raised by the pleadings herein;

4th. That it appears upon the face of the petition that the only proceedings in the State Court were by W. C. Stone, and that the proceedings in the State Court are binding upon this Court, and cannot be contradicted by evidence aliunde in a collateral proceeding like this is;

6th. That the verdict of the jury is against law;

7th. That this Court has no jurisdiction to enter a decree of adjudication.

The COURT.—The motion will be overruled.

Mr. MOREHOUSE.—To which ruling we save an exception.

The COURT.—The exception may be entered. The order of adjudication will be entered, and I will sign the documents in chambers.

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Motion to Stay Entry of Decree or Judgment upon the Verdict of the Jury. Filed July 16, 1909, at 1:30 o'clock P. M. T. J. Edwards, Clerk.

[Opinion of District Court.]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 103.

In the Matter of EXPLORATION MERCANTILE COMPANY (a Corporation),

An Alleged Bankrupt.

DETCHE & CARNEY, J. L. KENNEDY,
ROBERTS, RICHARDS & FOWLER,
for Petitioning Creditors.

THOMPSON, MOREHOUSE & THOMPSON,
for Defendant.

FARRINGTON, District Judge.—A jury having found that the Exploration Mercantile Company committed an act of bankruptcy by applying for a receiver while it was insolvent, a motion is now made in arrest of adjudication because of the alleged insufficiency of the creditors' petition.

It is averred in the amended petition that "at the date of filing the original petition herein, to wit, September 12th, 1908, for more than four months continuously next prior thereto and ever since said time, the aggregate of said Exploration Mercantile Company's property, at a fair valuation, amounted to less than the sum of Sixty Thousand Dollars, and that at all the said times its debts were in excess of Seventy-four Thousand Dollars."

This is a sufficient allegation that the Exploration Mercantile Company was insolvent August 6th, 1908, when an application was made to the State Court for

appointment of a receiver for the property of the company.

It is next alleged that the entire capital stock of the company consists of 50,000 shares of the par value of one dollar each, of which W. C. Stone owns 48,000 shares, F. G. Hobbs, 1,000 shares and C. E. Wylie, 1,000 shares; that these three persons not only owned all the capital stock, but they constitute the entire board of directors of said corporation, Stone being its president, Wylie its vice-president, and Hobbs its secretary and treasurer; that these three persons conspired and agreed to evade the provisions of the Bankrupt Act, and to prevent creditors from obtaining a knowledge of the company's affairs, and from participating in the choice of a trustee; to hinder, delay and defraud the creditors of the company, and to force them to accept less than the full amount of their claims; "that in pursuance of said conspiracy and agreement said directors and officers, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, A. D. 1908, caused to be filed in the District Court of the First Judicial District of the State of Nevada, in and for the County of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation." The petition so caused to be filed was presented by the said W. C. Stone. It was averred therein that the assets of the company amounted to \$95,000, while its liabilities were but \$65,000; that owing to depressed conditions

in business and the difficulty of making collections, the assets of the Company were in danger of being wasted through attachment or litigation; that the plaintiff Stone is the holder of more than one-tenth of the capital stock of the corporation, and "that said corporation should be dissolved and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for." The prayer, in substance, was that a receiver be appointed to manage the affairs of the company with a view to its dissolution. The creditors' petition also alleges that on the same day, August 6th, 1908, the above-mentioned petition was filed, summons was issued, on which said Wylie in pursuance of said conspiracy, and as the act of said corporation, indorsed an admission of service; that on the same day the said directors and officers, as the act of said corporation, caused to be filed in said court and cause an appearance and application for the appointment of a receiver of the property of said company. Said appearance reads in part as follows: "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, a corporation, Defendant. Now comes C. E. Wylie, manager and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

It is further alleged in the creditors' petition that on the same day "the directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, moved the said State Court upon the said pleadings as above set forth, for an order, and said State Court, on said day made its order, appointing said C. E. Wylie receiver," etc. On the following day said Wylie entered upon the duties of his office as such receiver. That on September 8th, 1908, and at other times, said Stone in pursuance of said conspiracy, and as the act of said corporation, sought to settle claims against it for sixty cents on the dollar; that ever since August 6th, 1908, said directors and officers have refused and still refuse petitioners access to the books of the company, and at all times have refused to permit petitioners' representatives to take or assist in taking an inventory of the property of the corporation. Near the end of the creditors' petition is this statement: "Ever since said 6th day of August, A. D. 1908, said Exploration Mercantile Company, a corporation, and each and all of said directors and officers have acquiesced in, upheld, ratified and confirmed the said proceedings and application for, and appointment of, said receiver as aforesaid; and said Frank G. Hobbs has ratified and confirmed the same and has since been continuously in the employ of the receiver." The petition concludes with a prayer that the Exploration Mercantile Company be adjudged bankrupt.

This petition having been filed, within due time thereafter the alleged bankrupt filed its answer, demanding a trial by jury. By consent of both parties the following issues in the form here set out were submitted to the jury:

“Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie as receiver of the Exploration Mercantile Company by the District Court of the First Judicial District of the State of Nevada in the case of W. C. Stone vs. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.”

“Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts.”

“Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a receiver for its property.”

The jury, after having heard the evidence and listened to the instructions of the Court, returned a negative answer to the first and second interrogatories, and an affirmative answer to the third.

Among the grounds urged in arrest of judgment and of the order of adjudication, there is no intimation that the verdict is not sustained by the evidence. The several grounds may be resolved into one comprehensive objection: the creditors' petition failed to show that defendant was guilty of an act of

bankruptcy in this, that it fails to show that defendant applied for a receiver for its property.

It is contended that the petition not only fails to show that the corporation applied for a receiver, but under the Nevada statute it was and is impossible for any Nevada corporation to make such an application.

Section 7 of the General Incorporation Law of Nevada (Stats. 1903, p. 121) provides that every corporation created under the provisions of this Act shall have power "To wind up and dissolve itself, or to be wound up and dissolved in the manner hereinafter mentioned."

The power granted is the power "to wind up and dissolve itself or to be wound up and dissolved in the manner hereinafter mentioned." It is the winding up and dissolution of the corporation which is provided for. There is no attempt to circumscribe or limit the power to ask the appointment of a receiver. Receivers are frequently asked and appointed for corporations when there is no thought of dissolution.

Section 89 of the Act provides a method of dissolution by voluntary action of the stockholders, officers and creditors.

Section 94, under which the proceedings in this case were had, provides for winding up a corporation by the Court, and reads as follows:

"Receiverships and Dissolution by the Court.

Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent of its entire outstanding capital,

or has willfully violated its charter, or its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, or its assets are in danger of waste through attachment, litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the District Court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the Court. Such court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving said corporation and terminating its existence.”

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property and the distribution of assets. Although the Act does not provide for the discharge of the debtor, and is not so entitled, it is essentially

an insolvency act. The winding up of the corporation discharges its debts.

“An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor.”

Harbough, Assignee, vs. Costello, 184 Ill. 110;
In re Merchants' Ins. Co., 17 Fed. Cas. No. 9441;
Moody vs. Development Co., 102 Me. 365;
Salmon vs. Salmon, 143 Fed. 395.

“In so far as the person and the subject-matter falls within the jurisdiction of the Bankrupt Act and is within the jurisdiction of the bankrupt court, the State insolvency law is superseded and cannot be invoked.”

Littlefield vs. Gay, 96 Me. 423;
Westcott & Co. vs. Barry, 69 N. H. 505;
In re Curtis, 91 Fed. 737.

In the absence of statutory authority courts of equity have no power to wind up the affairs of a corporation.

Beach on Receivers, sec. 86.

But when from any cause the property of a corporation is in imminent danger of waste or destruction and a receivership is necessary and there is no other adequate relief, a court of equity has inherent power to appoint a receiver to take charge of the corporate assets and affairs; but this power is to preserve and not to dissolve a corporation, but as soon as the necessity for such supervision ceases, the Court must lift its hands and retire.

Beach on Receivers, sec. 421.

The doctrine that a receiver cannot be appointed for corporate property on application of the corporation itself applies quite as strongly to persons as to corporations.

17 Ency. Pl. & Pr. p. 687.

If the rule not only forbids the appointment, but also renders it impossible for a debtor to apply for the appointment of a receiver over his own property, why did Congress declare it an act of bankruptcy for a person being insolvent to apply for a receiver? It is unreasonable to suppose that Congress would prescribe an act which no one can commit. There is a difference between asking and receiving; between the application for and the granting of a receivership. A corporation through its officers may apply for relief which a court may properly and justly refuse, or which it has no power to grant. When a person who is actually insolvent applies for a receiver for his property, the act of bankruptcy is committed, and this is so irrespective of any action which may be had in the court to which the application is made. The application is in itself an admission that the debtor's affairs require supervision.

The fact that certain powers are conferred by statute upon corporations does not mean that a corporation is unable to perform any act beyond the scope of such enumerated powers. The statute restricts the authority of the corporation and fixes the limits beyond which its acts are unlawful and in excess of the powers conferred. If it were otherwise a corporation could not be guilty of an ultra vires act, a tort, or a misdemeanor. Corporations

commit wrongful, unlawful and even criminal acts, and they are held responsible therefor even though the act is not the formal act of the corporation.

United States vs. McAndrews & Forbes Co., 149

Fed. 823, 835;

Clark on Corp., sec. 63.

“There may be actual corporate conduct,” says the Court in *People vs. North River Sugar-Refining Co.*, 121 N. Y. 582, 619, “which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution.”

A corporation is an association of natural persons united as one body and endowed by law with the capacity to act in many respects as an individual, as a separate and distinct entity, but a corporation can only act or think or purpose through its officers, directors or stockholders. It is inconceivable that a corporation should form or carry into effect any design which is contrary to the wishes of its directors, officers and stockholders; it exists to carry out their purposes and their plans. The conception that a corporation is a legal entity existing separate, apart and distinct from the natural persons who compose it is a fiction which has been introduced for convenience in making contracts, acquiring property, suing and being sued, and to secure limited liability on the part of stockholders.

“It is a certain rule,” says Lord Mansfield, Chief Justice, “that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.”

Johnson vs. Smith, 2 Burr. 962;

Wood vs. Ferguson, 7 Ohio St. 29;

Clark on Corp., p. 9.

The fiction of a corporate entity was never invented to promote injustice or defraud, and when it is used for such a purpose it should be disregarded, and the actual fact should be ascertained.

In re Rieger, Kapner & Altman, 157 Fed. 609,
613;

Bank vs. Trebien, 59 Ohio St. 316;

State vs. Standard Oil Co., 15 L. R. A. 145, 153,
34 L. R. A. 541;

People vs. N. R. S. R. Co., 121 N. Y. 582, 613;

United States vs. Milwaukee, etc. Co., 142 Fed.
247, 252;

Holbrook, Cabot & Rollins Corp. vs. Perkins,
147 Fed. 166, 169;

Cawthra vs. Stewart, 109 N. Y. S. 770;

U. S. & Mexican Trust Co. vs. Delaware etc. Co.,
112 S. W. 447, 460;

Southern E. S. Co. vs. State, 44 So. Rep. 785,
790;

7 Am. & Eng. Ency. L. 633, 634;

1 Cook on Corp. (5 ed.) p. 27.

“For certain purposes the law will recognize the corporation as an entity distinct from the individual

stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody.”

The Sportsman Shot Co. vs. American S. & L. Co., 30 Wkly. Law Bul. 87.

In *United States vs. Milwaukee Refrigerator Transit Co. et al.*, 142 Fed. 247, 255, it was charged that the Transit Company was a dummy corporation organized, owned and operated by the stockholders of the Brewing Company as a device to cover the receipt of rebates on interstate shipments of beer. After an exhaustive examination of the authorities, the Court stated the principle thus:

“If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the motion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.”

In *re Reiger et al.*, 157 Fed. 609, a proceeding in bankruptcy, the bankrupts were copartners; in the course of their business they had bought 99 per cent of the outstanding stock of a corporation, the remaining shares being held by relatives of one of the copartners. Receivers having been appointed for the partnership assets, an application was made to extend the receivership to the property of the corporation. It was charged that the bankrupts having

abandoned the partnership business, were still in control of the business and property of the corporation, and if permitted to remain in control they would remove and dispose of it. The Court held that all the property of the corporation belonged to the copartners, and entirely ignored the fact that the property belonged to a corporation. The Court said:

“The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankruptcy act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud.”

In *Bank vs. Trebein Co.*, 59 Ohio St. 316, 326, a failing debtor formed a corporation composed of himself and certain members of his family, to which he transferred all his property in exchange for stock of which he received substantially all. He immediately placed all his stock, except one share, with certain of his creditors as security for their claims, and then as president and general manager of the corporation, retained the control and management of the property and business which he had before the corporation was formed. The Court declared the corporation, in substance another Trebein, saying:

“The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals

composing it is of such general utility and application, as frequently to induce the belief that it must be universal, and be, in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction.”

In *Cawthra v. Stewart*, 109 N. Y. S. 770, Stewart owned 98 shares of the capital stock of a corporation known as L. C. Stewart & Co. and controlled the other two shares. Cawthra, induced by false representations made by Stewart, who was then a director of the company and its president, invested \$3,000 in the corporate business and received half the stock. Suit was brought against Stewart and the Company to rescind the stock contract and recover the amount paid. The corporation demurred that it was a distinct, definite entity, and not liable for any acts of Stewart which it had not authorized. The Court said:

“Strictly speaking, such terms as ‘authority’ and ‘ratification’ and others which imply separate personalities are inappropriate. We do not have a case of agency, but of identity. It cannot properly be said that the corporation could clothe Stewart with authority any more than that Stewart could clothe

himself with authority. He was the corporation, and it was only another form of him. Whatever he did with respect to the matters he was handling under the guise of a corporation was the act of the corporation.”

In the case of *State vs. Standard Oil Co.*, 15 L. R. A., 145, it appears that the stockholders in various corporations and a number of copartnerships interested in the oil business agreed to transfer their interests in their several properties, and all their corporate stock, to certain trustees; they were to receive in lieu thereof trust certificates equal in par value to the stock which they surrendered. There was no act on the part of the corporation, no formal act, it was simply the act of the stockholders of these various corporations, and of course that meant all the officers and the directors. It was held that this action of the stockholders was, under the circumstances, to be regarded as the act of the corporation.

The following extract is from the opinion:

“Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their

capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as incorporators or as individuals must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation to do an act which is designed to affect the property and business of the company, and which, through the control their numbers given them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose

of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto.”

While the motion now under consideration rests upon the alleged insufficiency of the creditors' petition, it may not be amiss to consider how completely certain allegations of the petition are supported and illustrated by the evidence.

The creditors were refused access to the books. Even after proceedings in the State Court were commenced the books were withheld and the creditors informed if they wished to see the accounts they must procure an order from that court. Mr. Ruhl was directed by the State Court to expert the books, but even he, armed with this authority, was not permitted to examine all of them; the accounts of Mr. Stone were withheld, and but a semblance of full exhibition was had. An order to produce books and papers was required in this court in addition to the subpoena duces tecum. A number of leaves were torn from the journal by Mr. Stone, and either lost or destroyed. Mr. Stone gives as an excuse for such mutilation of the journal that the agent of Bradstreet insisted on seeing the books. In the merchandise account only those purchases of merchandise were recorded for which cash payments had been made. Credit purchases of merchandise were not shown by that account, and could be ascertained only by examination of the various statements which ac-

companied each purchase. Obviously books kept in such a manner do not show liabilities; they conceal the real conditions.

An auto account, an account with Mr. Pryor, and a very active stock and commission account show frequent and considerable investments of Exploration Mercantile Company money. These, the book-keeper Mr. Hobbs, stated were really accounts of Mr. Stone. The transfers into Mr. Stone's personal account were shown, if at all, on the destroyed journal leaves. The detached ledger leaves showing Mr. Stone's personal account were withheld from examination until an order for production of books and papers was made in this court during the progress of the trial. An entry made December 31st, 1907, credits Mr. Stone with wages, \$36,000, and rent \$12,000; total \$48,000. In reference to these matters Mr. Hobbs testifies as follows:

“(By Mr. CARNEY.)

Q. I will ask you to examine Petitioners' Exhibit No. 9, being the journal, on page 31, under the head of 'Profit and Loss,' and 'Rent,' what was the amount of rent for that store building during the year 1906? A. \$3,600.

Q. That is at the rate of \$300 per month.

A. Yes, sir.

Q. That entry was made by yourself?

A. It was.

Q. As the treasurer of the corporation?

A. Yes, sir.

Q. I will ask you to examine this sheet known as 'Account Walter C. Stone,' on December 31, 1907

(hands to witness) for \$12,000; when was that \$12,000 placed thereon, the figures?

A. When was it placed there?

Q. Yes. A. On December 31st, 1907.

Q. 1907? A. Yes.

Q. I will ask you to examine an item known as 'Sundries' on December 31st, 1907, being an amount of \$55,801.50. A. Yes, sir.

Q. What does that include?

A. I could not tell unless I had the journal page for that, Journal 50, or I could get it from the ledger with time, it will take a little time to figure these things.

Q. This is the journal, is it not? (Hands book to witness.) A. Yes, sir, that page is missing.

Q. That has reference to the page that is missing, has it? A. Yes, sir.

Q. And those pages that are missing included these items of account?

A. The journal entries.

Q. Have you any idea what that fifty-five thousand odd dollars is for?

A. I have an idea, but I could not give it to you unless I could look over the ledger records, I could get it from that.

Q. I will ask you to look at the item of December 31st, 'Wages to date, \$36,000.' A. Yes, sir.

Q. When was that entry made?

A. December 31st, 1907.

Q. \$36,000? A. Yes, sir.

Q. I wish you would examine that paper and see if that was not \$12,000?

A. It has been changed, or the journal record was changed at that particular time, at that same time.

Q. It had been changed at that time?

A. Yes, it was changed at that time.

Q. There has been considerable diligence on your part, on Mr. Stone's part and on Mr. Wylie's part since the filing of this petition in bankruptcy to show by the books that this institution was solvent on the 6th day of August, 1908, has there not?

A. Yes, sir.

Q. I will ask you to look at the footings of \$87,439.89, and ask you whether or not those footings have not been changed?

A. The book records were changed at that particular time.

Q. They were changed from \$12,000 to \$36,000?

A. I don't know what the changes were; I would not state what the change was, but I remember of making that change myself; I made it.

The COURT.—When did you say that change was made? A. At the time of entry.

Q. (Mr. CARNEY.) When was the entry made?

A. December 31st, 1907.

Q. Do you know what wages Mr. Stone received?

A. The wages, no, unless I could figure it up.

Q. What was his salary as the president of the corporation?

A. I could not tell unless I figured it up from the ledger.

Q. You have no recollection as to what Mr. Stone drew as an officer of that corporation for a salary?

A. It went in as a lump sum, I believe, at that particular time.

Q. As a matter of fact, Mr. Stone never received more than \$300 per month, did he, during 1906, as wages?

A. I don't remember, I could not tell.

Q. Did you ever have any meeting as to what wages Mr. Stone should receive as an officer of this corporation?

A. Yes, sir.

Q. When was that meeting?

A. At the time this entry was made, I think, some time around there.

Q. Are there any records of it in the minute-book of the Exploration Mercantile Company?

A. I think so.

Q. Will you kindly produce them.

A. I am not absolutely certain, I think there was.

Q. I hand you the minute-book of the corporation (hands to witness), do you find any memorandum there?

A. It says, 'Meeting of the Board of Directors of the Exploration Mercantile Company. This meeting of the Board of Directors held on the 2d day of January, 1908, in the office of the Company, present W. C. Stone, Frank G. Hobbs, C. E. Wylie. At this meeting the Board examined the books of the corporation kept by its secretary, Frank G. Hobbs, and the balances struck by him, and on motion it was resolved that the said accounts are correct, and the balances are true, and that the same be and are hereby adopted and affirmed.'

Q. Those are minutes placed there by typewriting?

A. Yes, sir, these are typewritten minutes.

Q. Where were they prepared?

A. I don't know."

The reasons why Messrs. Stone, Wylie and Hobbs objected to an examination of the books are obvious. There is some testimony to the effect that Mr. Hobbs and Mr. Wylie objected to the petition presented by Mr. Stone in the State Court, but in the light of their conduct I am satisfied their objections were not serious. The refusal to permit examination of the books, and the adoption and use of a method of book-keeping which tended to conceal the real condition of the business, were calculated to hinder and delay creditors. In this Messrs. Stone, Wylie and Hobbs participated. The conduct of each of them indicates that he knew there was something to be concealed from the creditors, and also that he knew the concern was insolvent. They seem to have agreed upon Mr. Stone's salary after the services had been rendered. The term of service could not have exceeded two years, for which they fixed a salary of \$18,000 per year. During a portion of these two years Mr. Stone was travelling in Europe and China.

Is it reasonable to suppose that a concern having a total capital stock of \$50,000, paying its president a salary of \$18,000 per year and a rent of \$12,000 per year, can be operated at a profit? The evidence is very conclusive that each of the three men knew the business was running behind, and wished to conceal

that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the \$48,000 credit, who had mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent. of the stock of the concern, filed in the State Court a petition asking that Court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the State Court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore to defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager and directors, and by all its stockholders.

It is alleged, and the testimony shows, that all the directors, officers and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the Court for an order appointing Wylie receiver. It is also averred that the corporation ratified the

act. It is also alleged, and amply proven by the testimony, that this was all done to hinder, delay and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition. Inasmuch as all the stockholders, all the officers and all the directors of this corporation, without exception, are using the distinction between themselves and the corporate entity for the purpose of hindering, delaying and defrauding creditors, that distinction should be disregarded, and the act of applying for a receiver should be imputed to the corporation itself.

The motion in arrest of judgment is denied, and the usual adjudication of bankruptcy will be entered.

[Endorsed]: No. 103. In the District Court of the United States, in and for the District of Nevada. In the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. Opinion. Filed July 9th, 1909. T. J. Edwards, Clerk.

[**Order Declaring and Adjudging the Exploration
Mercantile Company Bankrupt.**]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE
COMPANY (a Corporation),
Bankrupt.

At Carson City, in said district, on the 9th day of July, A. D. 1909, before the Honorable E. S. Farrington, Judge of said court in bankruptcy, the petition of The Giant Powder Company Consolidated, a corporation, Pacific Hardware and Steel Company, a corporation, and J. A. Folger and Company, a corporation, that Exploration Mercantile Company, a corporation, be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Exploration Mercantile Company, a corporation, is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable E. S. FARRINGTON,
Judge of said court, and the seal thereof, at Carson
City, in said district, on the 9th day of July, A. D.
1909.

[Seal]

T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

[**Order Referring Matter to Referee in Bankruptcy,
etc.**]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY.

In the Matter of EXPLORATION MERCANTILE
COMPANY (a Corporation),
Bankrupt.

Whereas, Exploration Mercantile Company, a corporation, of Goldfield, in the county of Esmeralda and district aforesaid, on the 9th day of July, A. D. 1909, was duly adjudged a bankrupt upon a petition filed in this court against it on the 12th day of September, A. D. 1908, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to J. Poujade, Esq., Referee in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said Exploration Mercantile Company, a corporation, shall attend before said referee on the — day of —, at —, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

Witness the Honorable E. S. FARRINGTON,
Judge of the said Court, and the seal thereof, at Car-

son City, in said district, on the 9th day of July, A. D. 1909.

[Seal]

T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

[Endorsed]: No. 103. U. S. District Court, District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, Bankrupt. Adjudication and Order of Reference. Filed July 9th, 1909, at 3 o'clock P. M. T. J. Edwards, Clerk. By H. D. Edwards, Deputy Clerk.

[Petition for Writ of Error, etc.]

*In the District Court of the United States, for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

Exploration Mercantile Company, defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury, and judgment of adjudication of bankruptcy entered on the ninth day of July, 1909, comes now by Thompson, Morehouse & Thompson, its attorneys, and petitions said court for an order allowing said defendant to prosecute a Writ of Error to the Hon. the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made

and provided, and also that an order be made, fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and, that upon the giving of said security, all further proceedings be stayed and suspended until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners will ever pray.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Petitioner Exploration Mercantile
Company.

[Assignment of Errors.]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

Comes now the defendant, the Exploration Mercantile Company, and files the following assignment of error, upon which it will rely upon its prosecution upon the Writ of Error in the above-entitled cause, from the verdict of the jury, and the judgment made and entered on the ninth day of July, 1909, in the above-entitled cause.

That the verdict of the jury and the judgment of the Court is erroneous in matter of law, in that:

1.

That the petition in bankruptcy herein by the petitioning creditors does not set out or specify any act of bankruptcy, and does not state facts sufficient to constitute a cause of action in bankruptcy.

2.

That it appears upon the face of said petition that W. C. Stone as a stockholder of the Exploration Mercantile Company, defendant, filed a petition in the District Court for the First Judicial District of the State of Nevada, in and for the County of Esmeralda, under and as provided by Section 94 of the Incorporation Law of the State of Nevada, and that it appears upon the face of said proceedings taken by the said W. C. Stone, that the same was not founded upon insolvency, and that the action of the State Court was not based or founded upon insolvency, and that no issue of insolvency was raised or presented upon which the State Court acted.

3.

That it appears upon the face of the petition filed by the petitioners herein, as a petition in bankruptcy, that said proceeding in the State Court was not brought by the corporation, the Exploration Mercantile Company, and that the said Exploration Mercantile Company never applied for a receiver upon any ground whatever.

4.

That under and by the provisions of Subdivision 4 of Section 3 (as amended in 1903) of the Bankrupt Act of the United States of 1898, to constitute an act

of bankruptcy the corporation defendant herein must apply for a receiver being insolvent, or because of insolvency, a receiver must be appointed upon the application of some other person than the defendant, and it appears upon the face of the petition filed by the petitioning creditors herein, that the alleged acts of bankruptcy were under said subdivision 4 of Section 3 of the Bankrupt Act of the United States of 1898, as amended in 1903; and said petition fails to show that a receiver was appointed because of insolvency; or that said defendant, Exploration Mercantile Company ever applied for a receiver, or that any receiver was ever put in charge of the property of the said defendant, the Exploration Mercantile Company, by reason of insolvency of the said corporation under any law of the State of Nevada.

5.

That by the laws of the State of Nevada, to wit, the Act of the Legislature of the State of Nevada, approved March 16, 1903, and entitled "An Act providing a general corporation law," the defendant corporation herein had no power or authority to apply for the appointment of a receiver, and therefore, could not apply, and being insolvent or otherwise, for the appointment of a receiver over its assets or its properties.

6.

That it appears upon the face of said petition of said creditors that no meeting of the Board of Directors or any stockholders' meeting was ever had or held by said Exploration Mercantile Company, defendant herein.

7.

That the verdict of the jury, that the said Exploration Mercantile Company applied for a receiver, is outside of any issue made or presented by the pleadings herein, and that the Court had no jurisdiction or power upon said verdict, to enter the judgment of adjudication.

8.

That the Court had no jurisdiction of the petition herein, to adjudicate either by the verdict of the jury or by a decree of the Court, that the said Exploration Mercantile Company committed an act of bankruptcy in that no act of bankruptcy is averred in said petition of petitioning creditors or found by the verdict of the jury, or by any decree or order of this court.

9.

That the petition filed herein by the petitioning creditors being based upon the proceedings in the said State Court, is limited to the acts and proceedings in that court and no evidence is permissible to contradict in a collateral proceeding, the action of the State Court, and the action of the State Court is binding and conclusive upon the Federal Court, and that it appears by the action of the State Court in appointing a receiver, that such receiver was not appointed because of insolvency or through or by the corporation, and that the said District Court of the United States has no jurisdiction in the premises.

Wherefore, the said defendant, the Exploration Mercantile Company, plaintiff in error, prays that the judgment of the said Court be reversed and that

said adjudication of bankruptcy be set aside, and such directions be given that full force and efficacy may inure to defendants by reason of the defense set up in their answer, and in their motion made to said District Court not to enter said judgment of adjudication in said cause.

THOMPSON, MOREHOUSE & THOMPSON,
Attys. for Defendants and Plaintiffs in Error.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of the Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. (In Bankruptcy—No. 103.) Petition and Assignment of Errors in Writ of Error. Filed July 16, 1909, at 11:45 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attys. for Alleged Bankrupt. Goldfield, Nevada.

[Undertaking on Petition for Writ of Error.]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

Know All Men by These Presents: That we, Exploration Mercantile Company, a corporation, as principal, and Jas. E. McGowan and W. S. Elliott as sureties, are held and firmly bound unto the Pacific Hardware and Steel Company, a corporation,

Giant Powder Company, Consolidated, a corporation, and J. A. Folger and Company, a corporation, petitioning creditors herein, in the sum of Five Hundred (\$500) Dollars, to be paid to the said parties aforesaid, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals, and dated this 13th day of July, 1908.

Whereas, the above-named defendant, the plaintiff in error, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to correct the verdict of the jury, and reverse the judgment in the above-entitled cause, by the District Court of the United States for the District of Nevada;

Now, therefore, the condition of this obligation is such, that if the above-named defendant, the Exploration Mercantile Company, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal]

EXPLORATION MERCANTILE COMPANY.

By W. C. STONE,

Prest.

W. S. ELLIOTT.

JAS. E. MCGOWAN.

State of Nevada,
County of Esmeralda,—ss.

Jas. E. McGowan and W. S. Elliott, being first duly sworn, each for himself, says: That he is a resident and householder of the State of Nevada, and that he is worth the sum specified in the above and foregoing bond, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAS. E. MCGOWAN.

W. S. ELLIOTT.

Subscribed and sworn to before me this 13th day of July, A. D. 1909.

[Seal]

H. M. FARNAM,

Notary Public in and for the County of Esmeralda,
State of Nevada.

The foregoing bond is hereby approved as an undertaking to prosecute the Writ of Error, but it is not approved as a supersedeas.

July 16th, 1909.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of the Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. (In Bankruptcy—No. 103.) Undertaking on Petition for Writ of Error. Filed July 16, 1909, at 11:45 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attorneys for Alleged Bankrupt. Goldfield, Nevada.

[Order Allowing Writ of Error, etc.]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

At a stated term, to wit, the May Term, A. D. 1909, of the District Court of the United States, for the District of Nevada, held at the courtroom of said Court, in the city of Carson, State of Nevada, on the 16th day of July, 1909—Present: The Hon. E. S. Farrington, District Judge—in the matter of Exploration Mercantile Company, a corporation, an alleged bankrupt—in bankruptcy No. 103—upon motion of Messrs. Thompson, Morehouse & Thompson, attorneys for defendant, and the filing of a petition for writ of error and assignment of error,

It is ordered that a Writ of Error be and is hereby allowed, to have reviewed, in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and is hereby fixed at Five Hundred (\$500) Dollars, for the prosecution of said writ; said undertaking shall not operate as a supersedeas.

E. S. FARRINGTON,
District Judge.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In

the Matter of Exploration Mercantile Co., a Corporation, an Alleged Bankrupt. (In Bankruptcy—No. 103.) Order Allowing Writ of Error. Filed July 16, 1909 at 11:45 o'clock A. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attys. for Alleged Bankrupt. Goldfield, Nevada.

[Praeipie for Transcript of Record.]

*In the District Court of the United States for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the Writ of Error heretofore perfected to said court, and include in said transcript the following: Amended Petition of Creditors; Answer of Defendant; Plea to Jurisdiction; Verdict of Jury; Motion not to Enter Judgment; Order Denying Motion; Judgment Adjudication; Petition for Writ of Error; Assignment of Error; Bond and Approval; Order Allowing Writ of Error; Writ of Error; Citation; and this Praeipie; said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and on

file in the office of the Clerk of said Circuit Court of Appeals, at San Francisco, before the tenth day of August, A. D. 1909.

THOMPSON, MOREHOUSE & THOMPSON,
Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: No. 103. In Bankruptcy. In the District Court of the United States for the District of Nevada. In the Matter of Exploration Mercantile Company, a Corporation, An Alleged Bankrupt. Praecipe for Transcript on Writ of Error. Filed August 3, 1909. T. J. Edwards, Clerk. (3 o'clock P. M.) Thompson, Morehouse & Thompson, Attorneys for Defendant and Plaintiffs in Error. Goldfield, Nevada.

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States, for the District of Nevada, hereby certify that the papers contained in the above and foregoing transcript are correct copies of the original papers on file in my office, and are those designated and demanded of me by the attorneys of the defendant and plaintiff in error, by their praecipe served on me, and request made to prepare transcript, in accordance with such praecipe (see page 57), and that the same is true and correct transcript of the record, as demanded by the attorneys for defendant and plaintiff in error.

That the costs of this record, amounting to \$32.60, have been paid by the attorneys for said Exploration Mercantile Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Carson City, Nevada, this 11th day of August, A. D. 1909.

[Seal]

T. J. EDWARDS,
Clerk.

*In the District Court for the United States for the
District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
CO. (a Corporation),

An Alleged Bankrupt.

Writ of Error [Original].

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the District of Nevada:

Because in the record and proceedings, as also in the rendition of the judgment of adjudication upon the verdict of the jury, which is in the District Court before you, between Giant Powder Company, Consolidated; Pacific Hardware and Steel Company, a corporation; and J. A. Folger and Company, a corporation, petitioning creditors herein, and Exploration Mercantile Company, defendant, and plaintiff in error, a manifest error hath happened to the great damage of the Exploration Mercantile Company, plaintiff in error, as by their complaint appears, we, being willing that error, if any hath happened, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you if judgment be therein given, that then under and upon your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, on the 14th day of August, 1909, in the said Circuit Court of Appeals, to be then and there held that the record and proceedings aforesaid may be inspected that the said Circuit Court of Appeals may further cause to be

"WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 16th day of July, A. D. 1909, and of the Independence of the United States the one hundred and thirty-fourth."
(SEAL)

F. B. Monckton,
Clerk.

District Judge.

Service of the within writ of error and receipt of copy thereof is hereby admitted this 16th day of July, 1909.

ROBERTS, RICHARDS & FOWLER,
DETCHE & CARNEY and
J. L. KENNEDY,

By ROBERTS, RICHARDS & FOWLER,
Attorneys for Petitioning Creditors, and Defendants
in Error.

[Endorsed]: No. 103. In the District Court of the United States for the District of Nevada. In the Matter of the Exploration Mercantile Co. (a Corporation), an Alleged Bankrupt. (In Bankruptcy—No. 103.) Writ of Error. Filed July 16, 1909, at 3:45 o'clock P. M. T. J. Edwards, Clerk. Thompson, Morehouse & Thompson, Attys. for Alleged Bankrupt. Goldfield, Nevada.

[Citation—Original.]

In the District Court of the United States for the District of Nevada.

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE CO. (a Corporation),

An Alleged Bankrupt.

United States of America,—ss.

The President of the United States, to Pacific Hardware and Steel Company, a Corporation, Giant Powder Company, Consolidated, a Corporation, and J. A. Folger and Company, a Corporation, Petitioning Creditors; Messrs. Detch & Carney, Messrs. Roberts, Richards and Fowler, and J. L. Kennedy, Esq., Attorneys for said Petitioning Creditors:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this Writ, pursuant to a Writ of Error, filed in the clerk's office of the Dis-

trict Court of the United States, for the District of Nevada, wherein Exploration Mercantile Company, a corporation, is plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. S. FARRINGTON, Judge of the District Court of the United States for the District of Nevada, this 16th day of July, A. D. 1909, of the Independence of the United States, the one hundred and thirty-third.

E. S. FARRINGTON,
District Judge of District Court of the United
States, District of Nevada.

[Seal] Attest: T. J. EDWARDS, Clerk.

Service of the within and foregoing citation and receipt of a copy thereof is hereby admitted this 16th day of July, 1909.

ROBERTS, RICHARDS & FOWLER,
DETCHE and CARNEY and
J. L. KENNEDY,

By ROBERTS, RICHARDS & FOWLER,
Attorneys for Petitioning Creditors and Defendants
in Error.

[Endorsed]: No. 103. In the District Court of the United States, District of Nevada. In the Matter of the Exploration Mercantile Co. (a Corporation), an Alleged Bankrupt. (In Bankruptcy—No. 103.) Citation, in Writ of Error. Filed July 16, 1909, at 3:45 o'clock P. M. T. J. Edwards, Clerk. Thomp-

Pacific Hardware and Steel Company et al. 71
son, Morehouse & Thompson, Attys. for Alleged
Bankrupt. Goldfield, Nevada.

[Endorsed]: No. 1745. United States Circuit
Court of Appeals for the Ninth Circuit. The Ex-
ploration Mercantile Company (a Corporation),
Plaintiff in Error, vs. Pacific Hardware and Steel
Company (a Corporation), Giant Powder Company,
Consolidated (a Corporation), and J. A. Folger and
Company (a Corporation), Petitioning Creditors,
Defendants in Error. Transcript of Record. Upon
Writ of Error to the United States District Court
for the District of Nevada.

Filed August 12, 1909.

F. D. MONCKTON,
Clerk.

*In the District Court of the United States in and for
the District of Nevada.*

IN BANKRUPTCY—No. 103.

In the Matter of EXPLORATION MERCANTILE
COMPANY (a Corporation),
An Alleged Bankrupt.

Replication.

These replicants, The Giant Powder Company
Consolidated, a corporation, Pacific Hardware and
Steel Company, a corporation, and J. A. Folger and
Company, a corporation, saving and reserving to
themselves all and all manner of advantages by ex-
ception which may be had and taken to the manifold
errors, uncertainties and insufficiencies of the an-
swer of the said alleged bankrupt, Exploration Mer-

cantile Company, a corporation, for replication thereunto say: That they do and will aver, maintain and prove their said amended petition to be true, certain and sufficient in the law, and that the answer of the said alleged bankrupt is very uncertain, evasive and insufficient in law; that the said proposal of said W. C. Stone to settle the claims of said alleged bankrupt's creditors for not to exceed sixty per centum, confessed in paragraph V of said answer to have been made on the 8th day of September, A. D. 1908, was made four days prior to the filing of the original petition of these replicants and prior to the issuance of any injunction herein, as the records of this Honorable court will show, and the said confessed proposal could not have been made, and it was not made, for the reasons or any thereof alleged in said answer, but was made as stated and for the reasons alleged in said amended petition; that, at the time the demand confessed in paragraph VI of said answer to have been made, although the books and papers of said alleged bankrupt may have been in the nominal custody and control of said C. E. Wylie, one of said officers and directors, as receiver in said proceedings in said State court, each and all of said officers and directors have, ever since the appointment of said receiver, had free access to all said books and papers and have from time to time had control thereof at pleasure; and said alleged bankrupt, its officers or directors could at any time without violating any duty have given access to said books and papers

mentioned in said amended complaint; and it is not true that said demand was refused for the reason that the corporation was in the hands of a receiver or for the reason that its books or papers were in the custody of the law or were not in the custody or control of the officers or directors of said corporation; but, that said demand was refused for the reasons alleged in said amended petition; that said Exploration Mercantile Company or any or all of its officers or directors were not bound to have acquiesced in said proceedings in said State court for the reasons mentioned in said answer or at all. That this honorable court has full and complete jurisdiction in the premises. All which matters and things these replicants are ready to aver, maintain and prove as this honorable court shall direct, and humbly as in and by their amended petition they have already prayed.

THE GIANT POWDER COMPANY CONSOLIDATED,

By C. C. QUINN,

Secretary of Said Corporation.

PACIFIC HARDWARE AND STEEL COMPANY,

By W. H. SCOTT,

Assistant Secretary of Said Corporation.

J. A. FOLGER & CO.,

By R. R. VAIL,

Secretary of Said Corporation.

E. E. ROBERTS,

J. L. KENNEDY,

ROBERT RICHARDS,

Attorneys for Replicants.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. C. Quinn, W. H. Scott and R. R. Vail, do hereby make solemn oath that said C. C. Quinn is secretary of the Giant Powder Company Consolidated, a corporation, one of the petitioners herein; that said W. H. Scott is assistant secretary of the Pacific Hardware and Steel Company, a corporation, one of the petitioners herein; that said R. R. Vail is secretary of J. A. Folger and Company, a corporation, one of the petitioners herein; and that the statements contained in the foregoing replication subscribed by them are true, according to the best of their knowledge, information and belief.

C. C. QUINN.

W. H. SCOTT.

R. R. VAIL.

Before me, J. D. Brown, a notary public in and for the City and County of San Francisco, State of California, this 10th day of November, A. D. 1908.

[Notarial Seal]

J. D. BROWN,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 103. In the District Court of the United States in and for the District of Nevada. In the Matter of Exploration Mercantile Company (a Corporation), an Alleged Bankrupt. In Bankruptcy. Replication. Filed November 12th, 1908.

at 10 o'clock A. M. T. J. Edwards, Clerk. E. E. Roberts, J. L. Kennedy and Robert Richards, Attorneys for replicants, Carson, Nevada.

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original replication now on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Court at my Office in Carson City, this the 23d day of September A. D. 1909, and in the year of our Independence the 134th.

[Seal]

T. J. EDWARDS,
Clerk.

[Endorsed]: No. 103. U. S. District Court, Dist. Nevada. Re Exploration Merc. Co. In Bankruptcy. Replication No. 1745. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 24, 1909. F. D. Monckton, Clerk.

